

No. 16248

United States
Court of Appeals
for the Ninth Circuit

FRANK D. BETTENCOURT, JOE R. JACINTO
and VIOLET JACINTO,

Appellants.

vs.

BERTHA WATTS SHOTWELL,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Northern Division.

FILED

JAN 29 1958

PAUL P. O'BRIEN: GLEBK

No. 16248

United States
Court of Appeals
for the Ninth Circuit

FRANK D. BETTENCOURT, JOE R. JACINTO
and VIOLET JACINTO,

Appellants.

vs.

BERTHA WATTS SHOTWELL,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Northern Division.



INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Attorneys, Names and Addresses of.....	1
Certificate of Clerk to Record on Appeal.....	32
Certificate of Referee on Review to the Judge of the U. S. District Court.....	15
Decision and Order Denying Claim.....	9
Memorandum and Order.....	21
Notice of Appeal.....	30
Notice of Filing of Certificate of Referee on Review and of Hearing.....	20
Objection to Claim of Bertha Watts Shotwell.	7
Petition for Review.....	13
Proof of Claim by Individual.....	3
Ex. A—Check, \$10,000, Signed by Bertha May Shotwell	5
Statement of Points on Appeal.....	31

Dear Sir,
I have the honor to acknowledge the receipt of your letter of the 10th inst. in relation to the above matter.

I have conferred with the proper authorities and they have decided to grant you the same as requested.

I am, Sir, very respectfully,
Your obedient servant,
J. H. [Name]

Very truly yours,
[Name]

Enclosed find the same as requested.

I am, Sir, very respectfully,
Your obedient servant,
J. H. [Name]

NAMES AND ADDRESSES OF ATTORNEYS

CHADEAYNE & WILKINSON,

J. KINGSLEY CHADEAYNE,

37 West 10th Street,

Tracy, California,

Attorneys for Frank D. Bettencourt.

CARDOZA, TRIMBUR & NICKERSON,

812-13th Street,

Modesto, California,

Attorneys for Joe R. Jacinto and Violet
Jacinto.

NELS B. FRANZEN,

1106 N. El Dorado Street,

Stockton California, and

PETER J. SIMONELLI,

327 Bank of America Building,

Stockton, California,

Attorneys for Bertha Watts Shotwell.

NORMAN J. MULHOLLAND,

Stockton Savings & Loan Bank Building,

Stockton, California,

Attorney for the Debtor.

THE UNIVERSITY OF CHICAGO

DEPARTMENT OF CHEMISTRY

PH.D. THESIS

BY

ROBERT H. COOPER

1954

CHICAGO, ILLINOIS

1954

THE UNIVERSITY OF CHICAGO

DEPARTMENT OF CHEMISTRY

PH.D. THESIS

BY

ROBERT H. COOPER

1954

THE UNIVERSITY OF CHICAGO

DEPARTMENT OF CHEMISTRY

PH.D. THESIS

BY

ROBERT H. COOPER

1954

United States District Court for the Northern
District of California, Northern Division

No. 16966

In the Matter of:

WILLIAM W. DUNCAN AND SON

PROOF OF CLAIM BY INDIVIDUAL

State of California,
County of San Joaquin—ss.

Bertha Watts Shotwell of Route 1, Box 285,
Manteca, California, County of San Joaquin, State
of California, being duly sworn, deposes and says:

I.

That William W. Duncan and Son, the above-
named parties were at, and before the filing of them
of the Petition for relief under Chapter 11 of the
Bankruptcy Act, and still are, justly and truly in-
debted to the said deponent in the sum of Ten Thou-
sand Dollars (\$10,000.00).

II.

That the consideration of said debt is as follows:
A loan made to William W. Duncan and Son in
Manteca, California, on May 17, 1955.

III.

That there are no offsets or claims to said debt
except

IV.

That deponent does not hold, and has not, nor has any person by her order, or to her knowledge or belief, for her use, had or received any security or securities for said debt.

V.

That said check is attached hereto and marked "Exhibit A" and made a part hereof.

VI.

That said debt is now due and owing and unpaid.

/s/ BERTHA WATTS SHOTWELL.

Subscribed and sworn to before me this 29th day of January, 1958.

[Seal] /s/ NELS B. FRANSEN,
Notary Public in and for the County of San
Joaquin, State of California.

MAANTECA BRANCH

Bank of America

NATIONAL IRVING ASSOCIATION

90-712
1211

No.

MANTECA, CALIF.: *May 17 1955*

Mrs Wm Duncan *10000*

PAY TO THE ORDER OF

Ten thousand only *10000* *DOLLARS*

Betha May Shortall

000000
000000

Mrs Wm Duncan
Deposit
Wm Duncan & Sons
Dairy

Endorsed: Filed February 7, 1958.

[Title of District Court and Cause.]

OBJECTION TO CLAIM OF
BERTHA WATTS SHOTWELL

Comes now Frank D. Bettencourt and respectfully states and represents as follows:

(1) That he is a creditor of the above-named debtors, having heretofore, and on or about September 15, 1957, filed herein his claim against said debtor in the amount of \$14,194.87, together with interest thereon at six per cent (6%) per annum from July 1, 1957, for money theretofore loaned by claimant to said bankrupts; that said claim was subsequent to the filing thereof proved and allowed and is now an existing proved and allowed claim against said debtor in the amounts aforesaid.

(2) That he has heretofore made oral demand upon the attorney for debtors to file objections to the claim of Bertha Watts Shotwell, Route 1, Box 285, Manteca, California, more specifically hereinafter described and mentioned and that the attorney for said debtors has refused to file any such objections.

(3) That on or about January 30, 1958, one Bertha Watts Shotwell, Route 1, Box 285, Manteca, California, did file herein her claim in the sum of \$10,000.00, allegedly for a loan made to William Duncan & Son, Manteca, California, on May 17, 1955; that so far as can be ascertained, said claim has not yet been approved and allowed as a claim

against the above-entitled bankrupt and is pending herein, subject to any valid objections thereto that may be made.

(4) That said claim of Bertha Watts Shotwell filed herein as above specifically set forth and described is objectionable and is not subject to allowance herein for the following reasons:

(A) That said claim is barred by the provisions of Section 339 of the Code of Civil Procedure of the State of California, in that it is a claim upon a contract, obligation or liability not founded upon an instrument in writing made more than two (2) years after the date when cause of action first accrued in favor of claimant and against the above-named debtor on said claim.

(B) That claim, if any claimant has, is against one Mrs. William Duncan and not against the debtor above named, William Duncan & Son.

(C) That the moneys advanced or claimed to be advanced by claimant were advanced and paid to Mrs. William Duncan and not to debtor above named, William Duncan & Son and were used for the benefit of said Mrs. William Duncan and not for the benefit of debtor above named, William Duncan & Son.

Wherefore, said Frank D. Bettencourt prays that time and place of hearing on this objection to the claim of Bertha Watts Shotwell may be set by the referee or the Judge of the above-entitled Court and notice thereof given as required by law and that

upon said hearing, that said claim be disallowed and stricken from the records and files of the above-entitled matter.

Dated: March 15, 1958.

/s/ FRANK D. BETTENCOURT.

CHADEAYNE & WILKINSON,

By /s/ J. KINGSLEY CHADEAYNE,
Attorneys for Frank D. Bettencourt.

Duly verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 17, 1958.

[Title of District Court and Cause.]

DECISION AND ORDER DENYING CLAIM
OF BERTHA WATTS SHOTWELL

The claimant, Bertha May Shotwell, filed a claim against the above estate for \$10,000.00 for money loaned to the above debtor. Two creditors, Frank D. Bettencourt and Mr. and Mrs. Joseph Jacinto, through their attorneys, filed objections to the claim on the ground (1) that the claim was barred by the provisions of Section 339(1) of the Code of Civil Procedure of California and (2) that the claim was invalid under Section 1624(1) of the Civil Code of California, (Statute of Frauds).

The Facts

The facts were as follows: On or about May 21st, 1955, Mr. and Mrs. Duncan of the debtor partnership, borrowed the sum of \$10,000 from Mrs. Duncan's mother, Bertha May Shotwell, and received the money by a check dated May 17th, 1955 drawn on the Manteca Branch of the Bank of America, payable to Mrs. Wm. Duncan for \$10,000 and Bertha May Shotwell signed the check as maker. Mrs. Wm. Duncan endorsed the check and it is noted on the back as deposited in the account of Wm. Duncan & Sons.

Mr. and Mrs. Duncan testified that they borrowed the \$10,000 from Bertha May Shotwell, Mrs. Duncan's mother, for the purpose of buying cattle and feed for the partnership and agreed to pay back the loan to Mrs. Shotwell in installments after the prior F.H.O.A. loan should be paid off by monthly installments of \$325.00. Mrs. Shotwell was to be paid the same amount of monthly installments after that loan to F.H.O.A. had been paid, which they both testified would not be until 1959 or 1960. They testified that they gave no note or anything in writing in regard to the transaction. The transaction was entirely oral.

The loan was made and the check dated May 17th, 1955. The Petition for Arrangement in this proceeding was filed July 30th, 1957, more than two years later, and the claim was filed on January 30th, 1958.

Claimant's Argument

Counsel for the claimant argues (1) that the check was evidence in writing of the loan; (2) that since the loan was not to be repaid until after the F.H.O.A. loan was paid in 1959 or 1960, the cause of action would not accrue until then and the two year limitation would not commence to run until then, and; (3) that the oral agreement could have been paid off within one year and would, therefore, not be within the Statute of Frauds.

Conclusion

There is no dispute that all of the transactions in connection with the loan and the check to indicate that it was a loan or any written notation from which a promise to pay that amount to Mrs Shotwell can be shown. As shown by the case cited by Nels B. Fransen, attorney for the claimant, the Courts of California have been very liberal in allowing practically any writing from which a promise to pay can be drawn, to take the case out of the two year Statute of Limitations. A mere notation of "loan" on a check which was given to the borrower by the lender has been held sufficient. (*Tazola vs. DeRita*, (1955) 45 Cal. 2d 1; 285P 2d 897). Under the cases cited by J. Kingsley Chadeayne, attorney for Frank D. Bettencourt, the objector, a receipt or check in or of itself is not a sufficient written memorandum of a loan to the payee or a promise by the payee of the check to pay the maker. (*Ashley vs. Vischer*, 24 Cal. 322); (*Garcia vs. Sainz*, 59 C.A. 246; 210 P 534).

In this case, there is nothing whatever on the check from which a contract, promise or memorandum showing it was a loan and the money was to be repaid can be derived. The evidence of the loan rests entirely upon oral testimony.

The oral evidence was to the effect that the payments on the loan were not to start until the prior F.H.O.A. loan had been paid off in installments of \$325.00 per month which would be sometime in 1959 or 1960 and thereafter the payments at the rate of \$325.00 per month would be made to Mrs. Shotwell. Under Section 312 of the Code of Civil Procedure of California the claimant could only commence an action on the obligation within the period of two years prescribed in Section 339 CCP after "the cause of action shall have accrued", that is, sometime in 1959 or 1960, so that Section 339(1) would not apply to the matter before us.

Since the oral testimony was clearly to the effect that Mrs. Shotwell was not to be paid until the F.H.O.A. loan had been paid sometime in 1959 or 1960, the oral agreement was "by its terms not to be performed within a year of the making thereof", and was therefore "invalid" under Section 1624(1) of the Civil Code.

It is unfortunate that the elderly claimant did not have some evidence in writing of the loan.

It is, Therefore, Ordered that the claim of Bertha May Shotwell be, and it hereby is, denied and re-

jected because it is invalid under Section 1624(1) of the Civil Code of California because there was no note or memorandum thereof in writing subscribed by the party to be charged or by his agent.

Dated: June 4th, 1958.

/s/ EVAN J. HUGHES,
Referee in Bankruptcy.

[Endorsed]: Filed June 4, 1958.

[Title of District Court and Cause.]

PETITION FOR REVIEW

To the Hon. Evan J. Hughes, Referee in Bankruptcy:

The petition of Bertha Watts Shotwell, creditor in the proceedings for arrangement under Chapter XI, respectfully represents:

I.

The petitioner is a creditor in the sum of Ten Thousand (\$10,000.00) Dollars of William Duncan & Son, a co-partnership consisting of Bernice Bertha Duncan, Archer Edgar Duncan and Mary Patricia Duncan and William Walter Duncan, and has filed a claim in these proceedings for the sum of Ten Thousand (\$10,000.00) Dollars; that two creditors, Frank D. Bettencourt and Mrs. Joseph Jacinto, through their attorneys, filed Objections to the petitioner's claim.

II.

That on June 4, 1958, your Honor entered an Order herein denying the claim of this petitioner in the above-mentioned matter, which said Order was based upon a finding that said claim was invalid under Section 1624(1) of the Civil Code of California because there was no note or memorandum thereof in writing subscribed by the party to be charged or by his agent.

III.

That the said finding and the Order are erroneous in that the Honorable Referee committed an error of law in failing to apply the Doctrine of Full Performance as asserted by the petitioner in her briefs as eliminating the necessity of a writing under Section 1624 Sub.(1), Civil Code of California (Statute of Frauds).

Wherefore, petitioner prays that your Honor certify to the Judge of this Court and transmit to the Clerk the record of said proceedings having to do with, or in any manner bearing upon, the Order aforesaid, as provided in Section 39 of the Bankruptcy Act.

/s/ BERTHA WATTS SHOTWELL.

NELS B. FRANSEN and
PETER J. SIMONELLI,
Attorneys for Petitioner,

By /s/ PETER J. SIMONELLI.

Duly verified.

[Endorsed]: Filed June 12, 1958.

[Title of District Court and Cause.]

CERTIFICATE OF REFEREE ON REVIEW
TO THE JUDGE OF THE U. S. DISTRICT
COURT

To: Honorable Sherrill Halbert, Judge of the
United States District Court for the Northern
District of California:

I, Evan J. Hughes, Referee in Bankruptcy in charge of this proceeding, do hereby certify that in the course of the administration of said matter, two creditors, Frank D. Bettencourt, and Mr. and Mrs. Joseph Jacinto, filed objections to the claim of Bertha May Shotwell for \$10,000.00 for money loaned to the debtors, on the grounds: (1st) that the claim was barred by the provisions of Section 339 (1) of the Code of Civil Procedure of California (two year Statute of Limitation); and (2nd) that the claim was invalid under Section 1624 (1) of the Civil Code of California (Statute of Frauds) providing that the agreement "by its terms was not to be performed within a year from the making thereof".

The Facts

The facts were as follows:

On or about May 17, 1955, Mr. & Mrs. Duncan of the debtor partnership, borrowed the sum of \$10,000 from Mrs. Duncan's mother, Bertha May Shotwell, and received the money by a check dated May 17th, 1955, drawn on the Manteca Branch of

the Bank of America, payable to Mrs. Wm. Duncan for \$10,000 and Bertha May Shotwell signed the check as maker. (Claimant's Exhibit 1) Mrs. Wm. Duncan endorsed the check and it is noted on the back as deposited in the account of Wm. Duncan and Sons.

Mr. and Mrs. Duncan testified that they borrowed the \$10,000 from Bertha May Shotwell, Mrs. Duncan's mother, for the purpose of buying cattle and feed for the partnership and agreed to pay back the loan to Mrs. Shotwell in installments after the prior F.H.O.A. loan should be paid off by monthly installments of \$325.00. Mrs. Shotwell was to be paid the same amount of monthly installments commencing after that loan to F.H.O.A. had been paid, which they both testified would not be until 1959 or 1960. They testified that they signed no note or anything in writing in regard to the transaction. The transaction was entirely oral.

The loan was made and the check dated on May 17th, 1955. The Petition for Arrangement in this proceeding was filed July 30th, 1957, more than two years later, and the claim was filed on January 30th, 1958. The claimant, Bertha May Shotwell, an elderly woman, did not testify.

Claimant's Argument

Counsel for the claimant argue (1) that the check was evidence in writing of the loan; (2) that since the loan was not to be repaid until after the F.H.O.A. loan was paid in 1959 or 1960, the cause

of action would not accrue until then and the two year limitation would not commence to run until then; (3) that the oral agreement could have been paid off within one year and would, therefore, not be within the Statute of Frauds; and (4) that the advance of the money was "full performance" and would take the case out of the Statute of Frauds.

Conclusion

There is no dispute in the evidence as to the transaction and that all of the dealings in connection with the loan, except the check itself, were oral. The Referee held that since the oral testimony was that the installment payments to Mrs. Shotwell were not to commence until after the prior government loan should be paid off in monthly installments of \$325.00, which would be sometime in 1959 or 1960, that under Section 312 of the Code of Civil Procedure of California no action could have been commenced by Mrs. Shotwell until after the government loan was paid off in 1959 or 1960 and the cause of action would not accrue and the running of the Statute of Limitations would not commence until after the F.H.O.A loan should be paid off in 1959 or 1960 and therefore, the claim was not barred by the Statute of Limitations. From that ruling there is no review asked.

The Referee decided that since by the oral terms of the loan, the payments were not to commence until after the government loan should be paid off sometime in 1959 or 1960, the contract was not to

be performed within a year from the making thereof and was, therefore, invalid under Section 1624 (1) of the Civil Code of California.

The applicable provisions of Section 1624 are as follows:

“The following contracts are invalid, unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged or by his agent:

“(1) An agreement that by its terms is not to be performed within a year from the making thereof.”

As to the claimant's argument that the advance of the money by Mrs. Shotwell was a “full performance” on her part, there seems to be no recorded decision in California to that effect. Most of the cases holding that full or partial performance of his promise by one party will take the case out of the statute in order to prevent hardship or injustice, are cases of employment, where the worker has performed his part by doing the work, or land cases where money is paid or improvements made relying on the oral contract. The cases cited gave relief to claimants who sued on causes of action based on “Quantum meruit” “assumpsit”, implied promise to pay or unjust enrichment, and not on the oral contract which would be invalid under the statute of frauds. If claimant had filed her claim in this proceeding on one of such common law causes of action, it would then be barred by the two-year statute of

limitation. It was the oral agreement of the debtors to start paying more than two years later that saved the original oral contract from being barred by the two year Statute of Limitation.

The reasoning of the Referee and the authorities cited are set forth in the Opinion and Order of the Referee accompanying this Certificate.

Accompanying this Certificate are the following papers for the information of the Judge:

1. The Petition for Review of the claimant, Bertha Mae Shotwell;
2. The Decision and Order of the Referee holding that the claim is invalid under Section 1624(1) of the Civil Code of California and denying the claim;
3. The check dated May 17, 1955, of Mrs. Shotwell for \$10,000 (Exhibit 1, photostat);
4. The original claim of Mrs. Shotwell;
5. The Objections of Frank D. Bettencourt and Mr. and Mrs. Joseph Jacinto to the claim;
6. The briefs of the respective parties;
7. A transcript of the testimony prepared by the court reporter.

Dated: August 5th, 1958.

Respectfully Submitted,

/s/ EVAN S. HUGHES,

Referee in Bankruptcy.

[Endorsed]: Filed August 5, 1958.

[Title of District Court and Cause.]

NOTICE OF FILING OF CERTIFICATE OF
REFEREE ON REVIEW AND OF HEARING

To: CHADEAYNE & WILKINSON,
Attorneys at Law,
37 West 10th Street,
Tracy, California;

NELS B. FRANSEN &
PETER J. SIMONELLI,
Attorneys at Law,
1106 North El Dorado Street,
Stockton, California;

CARDOZO, TRIMBUR & NICKERSON,
Attorneys at Law,
812-13th Street,
Modesto, California.

You Will Please Take Notice: That the Certificate of Referee on Review to the Judge of the United States District Court from an order of the Referee denying the claim of Bertha May Shotwell, has been filed this 5th day of August, 1958, with the Clerk of the United States District Court, and you have ten (10) days from said date of filing within which to file exceptions thereto and said Certificate and Report will be on the calendar of the Judge of the United States District Court for argument and hearing on Monday, August 18th, 1958, at ten o'clock a.m. in the U. S. District Court Room No. 1, Fourth floor, Post Office Building, 8th & I Streets, Sacramento, California.

Dated: August 5th, 1958.

/s/ EVAN J. HUGHES,
Referee in Bankruptcy.

[Endorsed]: Filed August 6, 1958.

[Title of District Court and Cause.]

MEMORANDUM AND ORDER

Mrs. Bertha Watts Shotwell, a petitioning creditor in this matter, has filed a petition to review the order of the referee in bankruptcy denying her claim. She is the mother of Mrs. William Duncan,¹ and filed a proof of claim on February 7, 1958, alleging that the debtor, William Duncan & Son, was indebted to her in the amount of ten thousand dollars (\$10,000).

After a hearing, the referee in bankruptcy denied Mrs. Shotwell's claim, and concluded as follows:

“The facts were as follows: On or about May 21st, 1955, Mr. and Mrs. Duncan of the debtor partnership, borrowed the sum of \$10,000 from Mrs. Duncan's mother, Bertha May Shotwell,² and received the money by a check dated May 17th, 1955, drawn on the Manteca Branch of the Bank of America, payable to Mrs. Wm. Duncan for \$10,000 and Bertha May Shotwell signed as

¹Also known as Bernice Bertha Duncan.

²Also known as Bertha Watts Shotwell.

maker.³ Mrs. William Duncan endorsed the check and it is noted on the back as deposited in the account of Wm. Duncan and Sons.

“Mr. and Mrs. Duncan testified that they borrowed the \$10,000 from Bertha May Shotwell, Mrs. Duncan’s mother, for the purpose of buying cattle and feed for the partnership and agreed to pay back the loan after the prior FHOA loan should be paid off by monthly installments of \$325.00. Mrs. Shotwell was to be paid the same amount of monthly installments after the loan to FHOA had been paid, which they both testified will not be until 1959 or 1960. They testified that they gave no note or anything in writing in regard to the transaction. The transaction was entirely oral.

“The loan was made and the check dated May 17, 1955. The petition for arrangement in this proceeding was filed July 30th, 1957, more than two years later, and the claim was filed on January 30th, 1958.”

Other creditors objected to the proof of this claim, and two arguments were proposed in opposition to Mrs. Shotwell’s claim. The first was that the claim was barred by the applicable Statute of Limi-

³Although the referee in bankruptcy here states that Mrs. Shotwell signed the instrument as “maker,” there is no suggestion that he found the instrument to be anything other than a bill of exchange, or ordinary bank check.

tations, which foreclosed the commencement of an action upon an oral contract after a period of two years had passed from the accrual of the cause of action.⁴ The second was that the contract was invalid under the provisions of the Statute of Frauds,⁵ in that this was an oral agreement which, by its terms, could not be performed within a year.

It is a basic rule in bankruptcy proceedings that the validity of the obligations of the bankrupt are to be determined by the law of the state wherein the court of bankruptcy is located. See: 2 Remington on Bankruptcy § 954. Another basic rule is that the trustee in bankruptcy is specifically authorized to make all objections to any claim which could have been made by the bankrupt himself;⁶ also, should the trustee not make an appropriate objection, any creditor may raise his objection to the proof of a claim.⁷ Accordingly, the objections were properly raised, and the questions of law are to be determined by the law of the State of California.

Considering the first contention of the objecting creditors, that the obligation was barred by the Statute of Limitations, the referee properly rejected the argument. Although it is true that the

⁴California Code of Civil Procedure, Section 339.

⁵California Civil Code, Section 1624(1).

⁶Bankruptcy Act §70(c).

⁷Bankruptcy Act §57(d).

statute states that two years is the period of limitation for the commencement of an action upon an oral contract, it is equally true that the statute does not commence to run until the cause of action accrues. The introductory statute to the general section dealing with the limitation of actions states:

“Civil Actions, without exception, can only be commenced within the periods prescribed by this title, after the cause of action shall have accrued * * *”

California Code of Civil Procedure,
Section 312.

It is obvious that inasmuch as the first payment of the petitioning debtors was not to have been made until some time in 1959 or 1960, the Statute of Limitations could not be called into play until some two years after the time of the due date of the first payment.

However, in rejecting the claim of Mrs. Shotwell, the referee in bankruptcy relied upon the Statute of Frauds. He states:

“Since the oral testimony was clearly to the effect that Mrs. Shotwell was not to be paid until the FHOA loan had been paid some time in 1959 or 1960, the oral agreement was ‘by its terms not to be performed within a year of the making thereof,’ and was therefore ‘invalid’ under Section 1624(1) of the Civil Code.”

Looking first into the nature of the claim of the petitioning creditors, it is noticed that the referee found as a matter of fact that there was a loan made by Mrs. Shotwell. A loan, as defined by the Supreme Court of California, is:

“* * * the delivery of a sum of money to another under a contract to return at some future time an equivalent amount with or without an additional sum agreed upon for its use; and if such be the intent of the parties of the transaction will be deemed a loan regardless of its form.”

Milans v. Credit Discount Co., 27 C. 2d 335, 339, 163 P. 2d 869, 165 A.L.R. 621.

According to the facts as found by the referee, Mrs. Shotwell did lend \$10,000 to William Duncan & Son. Her side of the contract was performed completely; there was nothing left for her to do; her part of the agreement was fully executed.

It is the law of California that where a contract has been completely executed on one side, and there is nothing left to do but make the payment of consideration, the agreement is no longer within the Statute of Frauds.

“* * * But whenever a contract within the purview of the statute has been so far executed that nothing remains to be done but to pay the consideration, the fact that payment of the consideration is not required by the provisions of the contract to be made within a

year furnishes no defense to an action for such payment.”

23 Cal. Jur. 2d 401.

Such appears to be the rule of the great weight of authority according to Professors Williston and Corbin in their treatises. 2 Williston on Contracts § 504, p. 1470; 2 Corbin on Contracts § 454, p. 573. The rule of the Restatement is:

“Where any of the promises in a bilateral contract cannot be fully performed within a year from the time of the formation of the contract, all promises in the contract are within Class V of § 178,⁸ unless and until one party to such a contract completely performs what he has promised. When there has been such complete performance, none of the promises in the contract is within Class V.”

Restatement of the Law of Contracts § 198.

The referee in bankruptcy, in certifying this matter for review, has stated:

“As to the claimant’s argument that the advance of the money by Mrs. Shotwell was a ‘full performance’ on her part, there seems to be no recorded decision in California to that effect. Most of the cases holding that full or partial performance of his promise by one party will take the case out of the statute in

⁸Referring to the classes of contracts within the Statute of Frauds.

order to prevent hardship or injustice, are cases of employment, where the worker has performed his part by doing the work, or land cases where money is paid or improvements made relying on the oral contract. The cases cited gave relief to claimants who sued on causes of action based on 'quantum meruit,' 'assumpsit,' implied promise to pay or unjust enrichment, and not on the oral contract which would be invalid under the statute of frauds."

Although there may have been other remedies available to the petitioning creditor, it is the opinion of the Court that she was correct in relying on the contract when she presented her claim.

"The statute of frauds does not apply where there has been a full and complete performance of an oral contract by one of the parties to it; and such party is not relegated to his suit in equity or on the quantum meruit, but may sue on the contract in a court of law, particularly where the agreement has been completely performed as to the part thereof which comes within the statute."

37 Corpus Juris Secundum 762, Statute of Frauds, Section 251.

Since there appear to be no reported decisions of the California courts passing on the precise factual situation here presented, it is the duty of this Court to determine what the California courts would decide when the question was presented.

The California courts have held that the Statute of Frauds did not apply in cases of contracts executed on one side in situations dealing with employment contracts, *Roberts v. Wachter*, 104 C.A.2d 271, 231 P.2d 534; *Dean v. Davis*, 73 C.A.2d 166, 166 P.2d 15; an agreement between real estate brokers for the payment of commissions, *Hellings v. Wright*, 29 C.A. 649, 156 P. 365; an agreement involving the procurement of an oil lease, *Dutton v. Interstate Investment Corp.*, 19 C.2d 65, 119 P.2d 138; and an action for the commission on sales made under a concession contract, *Bergin v. vander Steen*, 107 C.A.2d 8, 236 P.2d 613.

A different view is suggested in *Hall v. Puente Oil Co.*, 47 C.A. 611, 191 P. 39. There, however, the statement of the California District Court of Appeals appears to be dictum. The appellate court declined to find any agreement upon which a decision could be based, stating:

“* * * the evidence touching the question is too vague and uncertain upon which to base a contract of such character.” 47 C.A. at 616.

Such is not the case here, where the referee found that there existed a definite contract, and that there was no uncertainty concerning its terms.

The latest statement of the rule by the California courts seems to be found in *Bergin v. van der Steen*, *supra*, where the court said at page 18:

“There is no merit in appellant Anderson’s argument that respondent’s claim is barred by

the statute of frauds in that it comes within section 1624(1) of the Civil Code, the one-year section. The answer to this contention is that Bergin has completely performed his promises under the 1940 contract, having assigned his rights under the original agreement and having thereafter refrained from bidding for concession privileges at the end of the 1941 season. Such agreement is thereby taken out of the operation of the statute. ((*Dutton v. Interstate Inv. Corp.*, 19 Cal. 2d 65, 70 [119 P.2d 138]; *Rest. Contracts*, § 198.)”

The referee has concluded that this rule cannot be applied to an oral contract for the repayment of money loaned. This Court believes that the better view is that the rule is applicable to such a contract because the purpose of the rule is to prevent unjust enrichment by one party to a contract when the other party already has fully performed his obligation under the contract. This Court is persuaded that the California courts would find this reason to be more impelling in the case of the contract to repay money loaned, than in the decided cases concerning oral contracts for employment, commissions, real estate transactions, et cetera. It is difficult to imagine a more complete performance on one side of a contract than the loaning of money by one party, leaving only repayment by the other party. Under this view the claim of the petitioning creditor is not barred by the Statute of Frauds.

Consequently, inasmuch as the Statute of Frauds

is not a proper defense to a contract which has been fully executed on one side, where there is no performance required other than the payment of consideration, the decision of the referee in bankruptcy must be reversed.

Accordingly, it is the order of the Court that the holding of the referee in bankruptcy be reversed, and that the matter be, and the same hereby is remanded for further proceedings not inconsistent with the foregoing views and opinions herein expressed.

Dated: August 25, 1958.

/s/ OLIVER J. CARTER,

United States District Judge.

[Endorsed]: Filed August 25, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Frank D. Bettencourt and Joe R. Jacinto and Violet Jacinto, his wife, creditor-objectors to claim of Bertha Watts Shotwell, appeal to the United States Court of Appeals for the Ninth Circuit from order made and entered in the above-entitled matter on the 25th day of August in the United States District Court for the Northern District of California, allowing claim of Bertha Watts Shotwell over the objections of

said Frank D. Bettencourt and Joe R. Jacinto and Violet Jacinto.

Dated: September 22, 1958.

CHADEAYNE & WILKINSON,
Attorneys for Frank D.
Bettencourt;

CARDOZA, TRIMBUR &
NICKERSON,
Attorneys for Joe R. Jacinto
and Violet Jacinto;

By /s/ J. KINGSLEY CHADEAYNE.

Affidavit of service by mail attached.

[Endorsed]: Filed September 25, 1958.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

Pursuant to Rule 75 (d) of the Rules of Civil Procedure, the creditor-objector-appellants hereby state the points on which they intend to rely on their appeal from Order entered herein August 25, 1958, as follows:

1. That the oral loan and agreement for repayment thereof, the basis of claim of Bertha Watts Shotwell, as found by the Referee and the Judge of the District Court was void under the provisions of Section 1624, Subd. 1, Civil Code of the State of California, in that it was an agreement that by its

terms was not to be performed within a year from its making thereof, and was required to be in writing, and;

2. That the Judge of the District Court erred in holding that the doctrine of "full and complete performance" applied to the facts as found so as to avoid the effect of Section 1624, Subd. 1, Civil Code of the State of California.

CHADEAYNE & WILKINSON,
Attorneys for Frank D.
Bettencourt;

CARDOZA, TRIMBUR &
NICKERSON,
Attorneys for Joe R. Jacinto
and Violet Jacinto;

By /s/ J. KINGSLEY CHADEAYNE.

Affidavit of service by mail attached.

[Endorsed]: Filed September 25, 1958.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO
RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents listed below, are the originals filed in this Court in the above-entitled

case, and that they constitute the record on appeal herein as designated by the appellant.

Proof of claim by individual Bertha Watts Shotwell.

Objection to claim of Bertha Watts Shotwell.

Decision and order denying claim of Bertha Watts Shotwell.

Petition for review.

Certificate of Referee on review to the Judge of the U. S. District Court.

Notice of filing of certificates of Referee on review and of hearing.

Memorandum & Order of the District Court.

Notice of Appeal.

Cost Bond on Appeal.

Statement of points on appeal.

Appellants' designation of contents of record on appeal.

In Witness Whereof, I have hereunto set my hand and the seal of said Court this 29th day of October, 1958.

[Seal]

C. W. CALBREATH,
Clerk.

By /s/ C. C. EVENSEN,
Deputy Clerk.

[Endorsed]: No. 16248. United States Court of Appeals for the Ninth Circuit. Frank D. Bettencourt, Joe R. Jacinto and Violet Jacinto, Appellants, vs Bertha Watts Shotwell, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Northern Division.

Filed: November 3, 1958.

Docketed: November 14, 1948.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.